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May 22, 2014

***, Superintendent

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION
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RE: **FINAL REPORT for** In the Matter of **, 2014-03, Alleged Violations of the Individuals With Disabilities Education Act (IDEA) and Montana special education laws.

This is the Final Report pertaining to the above-referenced state special education complaint (Complaint) filed pursuant to the Administrative Rules of Montana (ARM) 10.16.3662. *** (Complainant) filed the complaint on behalf of her child, ** (Student), a student in *** Public Schools (the District). Complainant asserts the District violated the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et. seq., Montana special education laws, Title 20, Ch. 7, Montana Code Annotated (MCA), and corresponding regulations at 34 CFR Part 300 and ARM 10.16.3007 et seq., by allegedly:

- (1) failing to conduct a timely initial evaluation in all areas of suspected disability;
- (2) failing to properly evaluate Student for eligibility for special education services thereby denying Student a Free Appropriate Public Education (FAPE);
- (3) failing to timely evaluate Student after Student's January 14, 2014 504 team determined his education needs were not being met and agreed to refer Student for an IDEA special education evaluation; and
- (4) failing to give Complainant appropriate access to Student's educational records.

A. Procedural History

1. On March 24, 2014, the Montana Office of Public Instruction (OPI) received a Special Education Complaint (Complaint).
2. The OPI Early Assistance Program found the parties were unable to resolve their issues within 15 business days of the date of the Complaint. The Complaint proceeded to investigation.
3. The OPI received a written response to the Complaint on April 18, 2014.
4. An appointed investigator conducted oral and/or written interviews with: Complainant (Student's mother), the District's superintendent, superintendent's assistant, clerk in the administration building, special education director, school psychologist, physical therapist, occupational therapist, and the following elementary school staff: principal, special education teacher, regular education teacher (reading and communication arts), and paraeducator.

B. Legal Framework

The OPI is authorized to address alleged violations, which occurred within one year prior to the date of a complaint, of the IDEA and Montana special education laws through this special education state complaint process as outlined in 34 CFR §§ 300.151-153 and ARM 10.16.3662. Pursuant to 34 CFR §§ 300.151-153 and ARM 10.16.3662, all relevant information is reviewed and an independent determination is made as to whether a violation of federal or state statute or regulation occurred. The OPI does not have jurisdiction over alleged violations of Section 504 of the Rehabilitation Act of 1973 (Section 504) and does not address those in this report.

C. Findings of Fact

1. Complainant is Student's mother and has standing to file this Complaint under the Montana special education complaint process at ARM 10.16.3661.
2. The District initially evaluated Student on October 6, 2004, qualifying him for special education services starting his preschool year. The current District occupational therapist and physical therapist were the same staff who initially evaluated him.
3. Student has been diagnosed with Arthrogryposis Multiplex Congenita Amyoplasia, a condition characterized by multiple joint contractures of the arms and legs which affects Student's joints. Student has had surgeries to repair a club foot and one foot has been amputated. Student is non ambulatory and uses a wheelchair. Student is not able to write with his hands but is able to write slowly by putting a pencil in his mouth. He fatigues quickly and has difficulty turning pages. He is dependent on help to load and unload his materials at school and also needs assistance when using the restroom and eating lunch. He also has a history of a seizure disorder.
4. Student moved out of District from kindergarten through April, 2010, his second grade year. He then moved back to the District but was homeschooled for the remainder of second grade through fifth grade.
5. On his last (out-of-district) IEP prior to the current one, dated May 14, 2009, Student was found eligible for special education services under the disability category of orthopedic impairment.
6. In April, 2013, Complainant alleges she went to the District administrative office to register her son for the following school year. The District administrative staff has no record or recollection of this attempted registration, or of a follow-up phone call in May, 2013, regarding Student's registration.
7. Complainant enrolled Student in sixth grade on August 20, 2013. The enrollment form is checked stating Student had not attended in the District before and that Student has an IEP.
8. The District requested education records from Student's prior school district on August 21, 2013 and again on August 29, 2013. Records were received a few weeks later, but included minimal information, with no copy of the prior school district's IEP for Student. Notes in Student's guidance folder indicated Student's prior school district had additional special education records which were not provided to the District. The District did not follow up to obtain the additional records, because the District believed the information from the prior school district was out of date. Student's principal indicated they understood the District would be "starting over" with an initial determination of eligibility.
9. On August 30, 2013, the District held a Section 504 meeting for Student to plan for accommodations before school started on September 3, 2013. The principal's plan was to then move forward with a special education evaluation.
10. A few days after the start of the school year, the principal notified the special education director of Student's enrollment and the need for an evaluation.
11. Complainant called the special education director sometime around September 10, 2013. Complainant called again before the special education director returned her call around September

- 17, 2014. The special education director contacted the school psychologist regarding getting Student evaluated.
12. On September 20, 2013 Complainant met with the school psychologist to sign a Referral for Comprehensive Educational Evaluation and an Evaluation Plan giving permission for the District to evaluate Student. Student was to be evaluated in the following areas: academic achievement, assistive technology, classroom based assessment, observations, psychological and social/emotional.
 13. Student traveled to another city in early November, 2013, for an assistance technology evaluation, but no one informed Complainant to bring Student's power wheelchair, so the evaluation was incomplete.
 14. On the Abbreviated Stanford Binet Intelligence Scales, Fifth Edition (SB5) (evaluation date November 11, 2013) Student scored in the superior range at the 95 percentile. He also scored in the above-average range on the Woodcock Johnson Tests of Achievement III (WJIII) (evaluation date October 1, 2013).
 15. An evaluation report meeting was held on November 12, 2013, with Student's off-site assistive technology assessment arriving just before the meeting started. The IEP team found Student ineligible for special education services, decided to continue the Section 504 plan, and agreed to reconvene if it was determined the Section 504 plan was not meeting Student's needs.
 16. The evaluation report team did not consider or make a determination on whether Student was IDEA eligible under the category of orthopedic impairment or other health impairment. The evaluation team did consider the learning disability category and found him ineligible under that category.
 17. The special education director assured the evaluation report team Student's accommodations could be met with the 504 plan.
 18. Based on Student's assistive technology assessment, the team decided Student needed a computer, to be provided by the District. Other accommodations included the provision of Dragon Speak voice recognition software, access to textbooks and homework on his computer, and an electronic planner. Student had access to a copy of his textbooks at home.
 19. Complainant did not receive a copy of the Evaluation Report (ER) after the November 12, 2013 meeting, although the ER notes indicate it was given to the parents. The note was hand written prior to when a copy was made, but District protocol is that the school psychologist will provide the parents a copy after the meeting. The psychologist inadvertently failed to provide a copy to the parents. On February 19, 2014, Complainant requested a copy of the ER and the District provided the school psychologist's hand written notes the next day.
 20. By December 3, 2013, District staff concluded Student could not keep up with his course work load. Student's communication arts and reading teacher was unable to give him a grade representing what he actually knew, because Student had so much trouble timely completing the work when writing by holding a pen with his mouth.
 21. The District's special education director did not order Student a computer until December 17, 2013. The director delivered it to the principal on January 12, 2014. The computer was not set up and available for Student to begin using until February, 2014. Student's reading teacher set up the electronic planner February 19, 2014. It took even longer for books to be available electronically for Student, and glitches were still being worked out at the time of the interviews for this Compliant.
 22. Student needs physical assistance with everything in the classroom, including setting up his assistive technology and putting it away. He needs modified writing assignments. He needs instruction in using voice recognition software.

23. On January 15, 2014, Student's Section 504 team met and decided to refer Student to special education for "...placement due to his need of special assistance with technology, transportation, and attendance due to chronic illnesses along with seizures. Parents were provided with a Home Bound Form to be filled out."
24. On January 17, 2014, the principal signed a Referral for Comprehensive Educational Evaluation and sent it to the special education director. District protocol calls for the referral to go through the special education director who then transfers it to the school psychologist. The special education director received the referral but failed to give it to the school psychologist.
25. On February 19, 2014 the school psychologist returned Complainant's phone call inquiring about status of the referral. The school psychologist followed up with the principal. The principal called the special education director who told him she received the referral.
26. On February 27, 2014, the school psychologist was at a meeting with the director of special education and requested a copy of the referral from the Section 504 team. The special education director indicated it was not on the electronic system and that she did not receive it. She gave the school psychologist permission to proceed with a new referral and evaluation plan.
27. On February 27, 2014, the school psychologist contacted Complainant to meet and sign a District referral and evaluation plan. Due to scheduling difficulties of both parties, the parties did not connect until on March 11, 2014, when the principal and school psychologist called Complainant who signed her consent to evaluations in classroom-based assessment, observations and receipt of medical documentation.
28. An evaluation report meeting was held April 3, 2014. Student was found to qualify as a Student with a disability under the category of other health impairment.

D. Analyses and Conclusions

Issue 1: Did the District fail to conduct a timely initial evaluation of Student in all areas of suspected disability?

Timely Evaluation.

Complainant asserts the District failed to do an initial evaluation within the required 60-day timeline. The investigation did not reveal evidence that the Complainant registered Student with the District in April of 2013 for the 2013-2014 school year¹. Student's District enrollment information was dated August 20, 2013. At that time the principal suggested to Complainant that Student be put on a Section 504 plan so accommodations would be in place when school started. The Section 504 team met August 30, 2013. School started September 3, 2013. The principal then relayed information to the special education director about the need for Student to be evaluated, assuming that would be enough to start the initial evaluation process. Either a parent or a district may initiate a request for an initial evaluation to determine if a child is a child with a disability and eligible for special education services. 34 CFR §

¹ The investigator questioned the superintendent, her assistant as well as the clerk in the administrative building and no one had recollection of Complainant registering student. Further, District procedure if a parent comes directly into the administrative building during the school year is to send them to their home school to be registered. Complainant alleged they did not know what home school Student would be attend due to special education services. According to the administrative staff, special education services typically do not matter because a student's home school is determined by boundary lines. If administrative staff had taken Complainant's registration, their procedure was to send it through inter-school mail directly to Student's home school. They would not have kept a copy. Student's principal has no recollection of receiving Student's registration in April of 2013.

300.301(b) and ARM 10.16.3320. The request for initial evaluation must include a statement of reasons for the request and the signature of the person making the request. 10.16.3320 ARM. The principal did not fill out a referral for comprehensive educational evaluation in September, 2013.

Student had received special education services in the past, but had been homeschooled for several years. The District requested Student's educational records from the prior school district, but it was clear to them they were starting over and needed to determine what Student's current needs were. Complainant began calling the special education director sometime around September 10, 2013, to determine when the evaluation would occur. The special education director returned her call around September 17, 2014, confirming the District would evaluate Student. The special education director contacted the school psychologist regarding getting Student evaluated. On September 20, 2013, Complainant met with the school psychologist to sign an initial Referral for Comprehensive Educational Evaluation and an Evaluation Plan for permission to evaluate Student in the areas of academic achievement, assistive technology, classroom-based assessment, observations, psychological and social/emotional. The ER team met November 12, 2013, to discuss Student's eligibility for special education services. The initial evaluation was done within 60 days of the date the District received parental consent in accordance with 34 CFR § 300.301(c)(1)(i). **Therefore, the District is not in violation of 34 CFR § 300.301(c)(1)(i).**

Even if the principal's request for evaluation had been formalized the first week of school, and parental consent obtained, the District would have had until sometime in the beginning of November to complete the initial evaluation. The principal had not done a referral before and had some confusion as to what was needed to initiate the evaluation. Further, the parent assumed an evaluation was occurring after August 30, 2014, and was not informed she would need to sign a consent form to initiate the request. It is recommended the District review their procedures for initiation of an evaluation with staff and clarify with parents what their involvement will be for accomplishing the initial evaluation.

Assessments in all Areas of Suspected Disability.

Complainant alleges the District evaluations were rushed and not appropriate for Student. On September 20, 2014, the school psychologist met with Complainant to complete an Evaluation Plan. The Complaint alleges "[t]he school district did not check the box to evaluate him for assistive technology/services. I asked why this was not checked when I met with the [school psychologist] to sign the permission form. She said she was not sure where to get this evaluation... The evaluation plan did not include a physical evaluation. This is the area I believe he qualifies for special education. He has an orthopedic impairment which affects his learning. Why did the school district not do a physical evaluation? I asked this question when I gave permission to evaluate him. I was told the therapists had already visited [Student] so this would not need to be redone."

Evaluation procedures are set out in 34 CFR §§ 300.304-305. When a child is evaluated they must be assessed in all suspected areas of disability. 34 CFR § 300.304(c)(4). The school psychologist met with the parent and used her input when completing the evaluation plan. Very little information was available on Student at that time. Education records from the prior school district attended by Student three years ago had not arrived, and very little information was available from his homeschooling. The school psychologist agreed with Complainant on the need for an assistive technology assessment as indicated on the September 20, 2013 Evaluation Plan. The District's physical therapist and occupational therapist had worked with Student in preschool and were aware of his condition. The school psychologist called

the physical therapist during the meeting with Complainant and they concluded Student did not need a physical evaluation as his diagnosis was determinative of an orthopedic impairment. The investigation did not reveal evidence that the District failed to assess Student in all areas of suspected disability. **The District is not in violation of 34 CFR §300.304(c)(4).**

Issue 2: Did the District err by failing to properly evaluate Student for eligibility for special education services? Did this deny FAPE?

IDEA Eligibility

Complainant alleges, and the District disputes, that the District erred when it failed to find Student eligible for special education services. Under the IDEA, once assessments have been conducted, a group of qualified professionals and the parents must meet to determine whether the student has a disability as defined by 34 CFR §300.8 and whether the student needs special education and related services due to the disability. 34 CFR § 300.306(a)(1). A child with a disability is defined in § 20-7-401(1), MCA, as “a child evaluated in accordance with the regulations of the Individuals with Disabilities Education Act as having a disability and who because of the disability needs special education and related services.” (See also 34 CFR § 300.8). ARM.10.16.3010 through 10.16.3022 list the Montana eligibility criteria categories under which a student could be found to be a child with a disability. Special education means specially designed instruction given at no cost to the parents or guardians, to meet the unique needs of a child with a disability, including but not limited to instruction conducted in a classroom, home hospital, institution, or other setting and instruction in physical education.” Section 20-7-401(4), MCA. Related services are defined as “...services in accordance with regulations of the Individuals with Disabilities Education Act that are required to assist a child with a disability to benefit from special education.” Section 27-7-401(3), MCA. If a child meets an eligibility category, but only needs related services and not specially designed instruction, the child is not considered to be a child with a disability for eligibility purposes. 34 CFR 300.8(a)(2)(i).

In *Letter to Pawlish*, the Office of Special Education Programs (OSEP) provided guidance about determining eligibility of a student with physical impairment whose academic performance does not appear to be adversely affected. 24 IDELR 959 (1996). If a student requires modifications that are “specially designed instruction” because they constitute individualized instruction for a particular student, this could be deemed special education depending on the factual circumstances. “The fact that a student with a physical impairment performs well in school does not necessarily mean that he or she does not need special education and related services because of the impairment. This determination would have to be made on a case-by-case basis in light of the particular facts and circumstances.” *Letter to Pawlish*, 24 IDELR at 2.

Further, if a child is eligible for services or accommodations under both Section 504 of the Rehabilitation Act of 1973 and the IDEA, a district must comply with both statutes. *Yankton v. Schramm*, 93 F.3d 1369,1376 (8th Cir. 1996). The two statutes are not coextensive and a school district is not free to choose which statute it prefers. If a Student is eligible under IDEA, appropriate IDEA services **must** be provided. *Id.* In *Yankton*, the court held a student with an orthopedic impairment who was doing well academically nevertheless was eligible under the category of orthopedic impairment because she needed services to shorten or modify writing assignments and instruction on how to type using only her left hand and first finger of right hand. Without this specially designed instruction, the student’s ability to learn and do the required class work would have been adversely affected by her

orthopedic impairment. *Id* at 1375. Thus she needed specially designed instruction and was eligible for IDEA special education services. A district meets its 504 obligations when it provides this broader IDEA coverage. 34 CFR 104.33(2) clarifies that a district can meet 504 FAPE obligations through an IEP under the IDEA: “Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.” See also *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008); *K.M. et al v. Tustin Unified School District*, 725 F. 3d 1088(9th Cir. 2013).

Criteria for identifying a student as having orthopedic impairment under ARM 10.16.3017 include:

(1) ...

- (a) The student is diagnosed by a qualified medical practitioner as having an orthopedic impairment;
- (b) The impairment is severe; and
- (c) The impairment adversely affects the student’s educational performance.
- (d) The term orthopedic impairment includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease...and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

Prior to his return to the current District, Student had been found eligible for special education services under the disability category of orthopedic impairment for a previous 2009 IEP from a different district in Montana. In 2013, the District did not perform a physical evaluation, but there was no dispute that Student has a diagnosis of arthrogryposis and a severe orthopedic impairment which limits his abilities to perform at school. At the time of the ER meeting, Student was academically performing with passing grades but his teacher noted his inability to keep up with writing assignments.² Student cannot write except with a pencil in his mouth and it takes him an extremely long time. The ER team recognized and discussed Student’s need for several assistive technology accommodations to allow him to perform adequately in the general education class. The ER team agreed that the District would provide Student with a laptop with Dragon Speak voice recognition software, make his text books electronically available on his computer, and to provide an electronic planner. There was no debate that Student needs specially designed instruction to be able to use his computer and other assistive technology and needs physical assistance with daily classroom activities. Student will need training to gain the necessary skills for dictation to be able to use the voice recognition software effectively, and District staff need training to assist student with necessary technological support.

At the November 12, 2013 ER team meeting, however, the team determined Student was not eligible for special education services as follows: “[Student] does not demonstrate a significant discrepancy between his cognitive ability and academic achievement. The team determined at this time a 504 plan will meet his needs.” The ER team marked the form stating Student did not meet any disability criteria and “SLD” was handwritten next to this box.

² His teacher reported that until Student’s assistive technology was set up, it was not possible to know what to reasonably expect from Student or how to accommodate his classroom work.

For an ER team to properly consider IDEA eligibility, an initial evaluation report must include information necessary to address criteria listed in ARM 10.16.3010-10.16-3022. See ARM 10.16.3321(2). The evaluation report does not make reference to any eligibility criteria and no criteria checklists are attached to Student's evaluation report. The ER team did not discuss any likely disability categories for which Student may have been found eligible such as orthopedic impairment or other health impairment. The investigation revealed a consensus that the team never determined whether Student was eligible for special education services because they deferred to the special education director whose position was that Student could be adequately accommodated through a Section 504 plan. As such, the ER team agreed to find Student ineligible and "wait and see" if accommodations under a Section 504 plan were sufficient for Student. As discussed above, this is inconsistent with the requirement that a District must provide special education services if a child is eligible for services under the IDEA.

The ER team had a responsibility to consider and address Student's eligibility for IDEA special education services. The ER team failed to analyze the obvious IDEA category of orthopedic impairment or other eligibility categories and incorrectly assumed that 504 accommodations could substitute for the District's duty to analyze eligibility under the IDEA. Refusal to ask the question of IDEA eligibility does not relieve the District of this responsibility. The District does not have discretion to choose a Section 504 plan over an IEP for a student when he qualifies for IDEA services. If the Student is eligible under IDEA, the District must serve Student under IDEA. Therefore, the **District is in violation of 34 CFR § 300.306(a)(1)** for failure to properly determine whether Student was eligible for IDEA special education services.

Did the Failure To Properly Determine Eligibility For IDEA Services Deny Student a FAPE?

The procedural error of failing to determine Student's IDEA eligibility has implications for whether the District denied Student a free appropriate public education. Under the IDEA, FAPE means the provision of special education and related services provided at no cost to parents that are provided in conformity with an IEP. 34 CFR §300.17. If procedural requirements had been met, the standard to determine whether a student with a disability has received FAPE, would be the "educational benefit" standard. *J.L. v. Mercer Island School Dist.*, 592 F.3d 938,951 (9th Cir. 2010). citing *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 197 (1982). However, the District's procedural error meant Student did not even have a chance to receive any educational benefit through an IEP.³ Courts have found that such a procedural error can, in and of itself, constitute a failure to provide FAPE. In a Baltimore case, the parents had sent a certified letter to the public school requesting to enroll their child and noting the child's disability issues but the school failed to respond. *Baltimore City Bd of School Commissioners et al v. Taylorch, et al.*, 395 F.Supp.2d 246 (D. M.L. 2005). A federal district court in Maryland found a FAPE violation as follows:

"As the ALJ noted, the Plaintiff BCPS conceded that its failure to convene to evaluate Isobel's educational needs on receipt of the October 7, 2003 letter constituted a procedural violation of the IDEA. *Taylorch*, OAH No. MSDE-CITY-OT-04-20285 at 10. This procedural violation alone can constitute a failure to provide a FAPE. See *Tice By and Through Tice v. Botetourt*

³ If a student meets eligibility criteria for IDEA services, here for undisputed severe orthopedic impairment or OHI, and as here, has a demonstrated need for specially designed instruction, the District must serve the student under the IDEA. As these factors were not in dispute, Student should have been found eligible for special education services.

County Sch. Bd., 908 F.2d 1200, 1206 (4th Cir.1990) (quoting *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir.1987)) (noting that “failures to meet the Act's procedural requirements are adequate grounds by themselves for holding that a school failed to provide ... a FAPE”). However, BCPS argues that its procedural violation did not constitute denial of FAPE because the Parents did not show that Isobel suffered an educational loss as a result. This argument fails because the procedural error here precluded the development of an IEP at all.

When defining a test for the denial of a FAPE in *Rowley*, the Supreme Court noted that the first step of the inquiry includes the requirement that the court “determine that the State has created an IEP for the child in question ...” *Rowley* a FAPE. See e.g., *Tice*, 908 F.2d at 1207 (stating that failure to implement an IEP left “simply no question” as to a denial of FAPE); ...

In this case, it is clear that BCPS's procedural violation resulted in its failure to develop an IEP. Therefore, the ALJ was correct in finding that “the procedural violation ... clearly resulted in a denial of FAPE.” *Taylorch*, OAH No. MSDE–CITY–OT–04–20285 at 12.

Baltimore, *supra* at 247-248.

The Ninth Circuit has also addressed procedural violations as a denial of FAPE. In *Doug C. v. Hawaii*, 720 F.3d 1038 at 1046 (9th Cir. 2013), the Court set out the standard for finding a procedural error holding it is not necessary to look at the substantive issues when a procedural error results in *loss of educational opportunity* or infringes on parental rights. “We have repeatedly held that “procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE.” (citing *Shapiro*, 317 F.3d at 1079 and *Amanda J. v. Clark Co. School Dist.*, 267 F.3d 877, 892(9th Cir.2001). See also *N.B. v. Hellgate*, 541 F.3d 1202 at 1208 (9th Cir. 2008. In a recent 9th Circuit case, *Michael P v. Hawaii*, 656 F.3d 1057 at 1068 (9th Cir. 2010), the court addressed eligibility dealing with a specific learning disability and the severe discrepancy model and noted the district improperly relied *exclusively* on the “severe discrepancy model” to determine whether the student was eligible for special education . *Id* at 1066. The court ruled the district procedurally violated IDEA by applying regulations that require exclusive reliance on the “severe discrepancy model” at the eligibility meeting. This violation deprived the Student of a significant educational opportunity because it resulted in an erroneous eligibility determination.

A procedural violation of IDEA is harmless unless it deprives the child of an educational opportunity. See *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 938 (9th Cir.2007). A child experiences an egregious loss of educational opportunity when she is erroneously denied eligibility for special education services. Cf. *T.A.*, 129 S.Ct. at 2495 (“It would be particularly strange for the Act to provide a remedy, as all agree it does, when a school district offers a child inadequate special education services but to leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to services altogether.”). *Id* at 1070.

That reasoning is applicable here. The District made a procedural error by failing to even address or properly determine Student's eligibility for IDEA special education services at the evaluation meeting. Failure to determine eligibility under these circumstances was a procedural error which constitutes a clear denial of a FAPE. **The District is found to have violated Student's right to FAPE under 34 CFR §300.17.**

Issue 3: Did the District fail to timely evaluate Student after his Section 504 team determined on January 14, 2014, that his education needs were not being met and referred him for an IDEA special education evaluation?

Student's Section 504 team met on January 15, 2014, and determined Student's education needs were not being met as he needed special education "...due to his need of special assistance with technology, transportation, and attendance due to chronic illnesses along with seizures. Parents were provided with a Home Bound Form to be filled out." Complainant completed a consent form for evaluation. She alleges the IDEA evaluation was not completed in a timely manner.

On January 17, 2014, the principal completed a District Referral for Comprehensive Evaluation form and faxed it to the director of special education. District protocol is for a referral to go through the special education director before the school psychologist receives it. The special education director received the referral but did not forward it to the school psychologist. Having heard nothing from the District after a month, Complainant followed up with the school psychologist on the referral. On February 19, 2014, the school psychologist returned her call and contacted the principal. The principal contacted the special education director who confirmed she had received the referral. On February 27, 2014, the school psychologist was at a meeting with the director of special education and requested a copy of the 504 team referral. The special education director indicated the referral was not on the electronic system and that she had not receive it. She gave the school psychologist permission to proceed with a new referral and evaluation plan. That same day the psychologist contacted Complainant for a meeting on March 3, 2013, to complete another referral and evaluation plan. For various reasons the parties were not able to meet until March 11, 2014, and Complainant completed the new referral and evaluation plan consenting to evaluations in classroom based-assessment, observations and medical documentation. An evaluation report meeting was held on April 3, 2014, and the ER team determined Student was eligible as a student with a disability under the category of other health impairment.

Due to the change in the date of the referral as approved by the special education director, the initial evaluation was completed within 60 days of when the District received parental consent in accordance with 34 CFR § 300.301(c)(1)(i). However, the first referral was not even processed by the special education director. Had the special education director properly processed the first referral, the evaluation would have been required to be completed by mid-March, 2014. It took approximately two more months to provide another consent form for Complainant's signature which in turn extended the District's deadline in which to complete the evaluation.

The regulations do not set out a total required timeframe from referral to parental consent. The comments to the federal regulations noted "We decline, however, to specify the timeframe from referral for evaluation to parental consent, or the timeframe from the completion of an evaluation to the determination of eligibility... However, it has been the longstanding policy that evaluations be conducted within a *reasonable period* of time following the agency's receipt of parental consent, if the

public agency agrees that an initial evaluation is needed to determine if the child is a child with a disability.” *U.S. Dept. of Educ. Discussion of the Federal Regulations*, 71 Fed. Reg. 46637 (August 14, 2006) (emphasis added). If the amount of time to conduct the evaluations must be reasonable, it follows the amount of time from referral to obtaining parental consent must also be reasonable. Here the amount of time from referral to parental consent was unreasonable. The District took no action and did not move the referral forward until Complainant initiated a follow-up call to the school psychologist a month after the Section 504 team decided to refer. At the January 14, 2014 meeting, the Section 504 team expressed frustration with the amount of time it was taking to get Student set up with the promised assisted technology and believed the Section 504 plan was not meeting his needs.

Student’s computer had not even been ordered by the special education director until December 17, 2014 and arrived on January 12, 2014. It was unusable by Student and needed to be set up. Student had fallen behind in his courses and his teachers were uncertain how to grade him because he simply could not keep up with the writing and the workload. It was clear to the Section 504 team that his 504 plan was not meeting his needs and they wanted him reevaluated as soon as possible. The special education director attended the initial evaluation plan meeting and presumably was aware of the need to refer Student if the Section 504 plan was not working.⁴ The actions of the special education director directing the school psychologist to do a “new referral” extended the timeline for completion that had been initiated by the January 14, 2014 referral. The deadline would have been March 13, 2014 but the director’s directive to do a new referral moved the regulatory deadline into May. This manipulation of referral events violates procedural requirements to timely complete an initial evaluation. **The District failed to conduct a reasonably timely initial evaluation** in violation of 34 CFR 300.301(c)(1)(i).

Issue 4: Did the District deny appropriate access to Student’s records by failing to give her a copy of the November 12, 2013 ER and the evaluation referral and plan?

Complainant alleges the District erroneously failed to provide her with a copy of the November 12, 2013 Evaluation Report. The notes of the November 12, 2013 Evaluation Report state that a copy was given to the parents, but the investigation revealed the school psychologist had erroneously written the note on the ER report during the meeting, then failed to provide a copy at that time. Parents must be provided a copy of the evaluation report and the documentation of determination of eligibility at no cost. 34 CFR § 300.306(a)(2). The District’s duty to provide a copy of the evaluation report and eligibility documentation is not dependent on a parental request.

The regulation does not specify a timeframe, but it is clear from District practice that the school psychologist generally provides a copy right after the evaluation report meeting. The school psychologist inadvertently failed to provide a copy to the parents after the meeting. “The Act does not establish a timeline for providing a copy of the evaluation report or the documentation of determination of eligibility to the parents and we do not believe that a specific timeline should be included in the regulations because it is a matter best left to state and local discretion.” *U.S. Dept. of Educ. Discussion of the Federal Regulations*, 71 Fed. Reg. 46645 (August 14, 2006). Neither do Montana regulations specify a timeline. Complainant requested a copy of the evaluation report from the school psychologist on February 19, 2014 and a copy was provided for her at the school the next day. As soon as the school psychologist was notified of the error on February 19, 2014, she provided a copy to the parents at no

⁴ Her signature is not on the report, but the investigation made it clear she was an active participant at the meeting.

cost. However, Complainant should not have to request a copy before one was provided to her. The practice of noting that a copy has been given to parents prior to this actually being done was understandably confusing to the parent and should be revised by the District. **The District did procedurally violate 34 CFR § 300.306.**

Complainant also alleges a violation because she did not receive a copy of the evaluation referral and plan she signed on September 20, 2013. Pursuant to 34 CFR § 300.501(a), “[t]he parents of a child with a disability must be afforded, in accordance with the procedures of §§ 300.613 through 300.621, an opportunity to inspect and review all education records with respect to: (1) the identification, evaluation, and educational placement of the child.” The timeframe for inspecting and reviewing educational records is set out in 34 CFR §300.613(a): “Each participating agency must permit parents to inspect and review any educational records relating to their children that are collected, maintained or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP.... and in no case more than 45 days after the request has been made.”

Parents may request to inspect and review all of their child’s educational records but the IDEA does not place an affirmative obligation on the District to provide a copy of the evaluation referral or evaluation plan without request like it does with an evaluation report. Complainant alleges that she requested these documents sometime around the end of December but cannot recall to whom she made the request. **We find the District did not violate 34 CFR §§ 300.501(a) or §300.613(a).**

E. Disposition

The District is ORDERED to take the following actions:

1. The District shall review its practice and procedures for processing a referral for initial evaluation and create a procedure to ensure a referral is independently recorded as to when it is provided to the special education director and independently recorded as to when it is provided to the school psychologist. The District shall draft criteria for when or if a director or other staff may refuse to process the referral and for clarity shall set a timeframe for each step in the process. The proposed changes shall be submitted to the Office for approval **by September 5, 2014**. The District shall provide training on these policies and procedures to all District staff **by November 23, 2014**.
2. The District shall make available specific technology assistance to assist classroom staff to set up and operate the software and other technology needed for this and any other student with assistive technology needs **by June 23, 2014**.
3. The District shall offer services adequate to compensate for the failure to provide appropriate educational services to Student from November 12, 2013 to April 3, 2014. Compensatory services must include services in the area of specialized instruction with assistive technology to ensure Student is able to properly use his laptop, voice recognition software, and electronic planner, and access to his books on his computer plus any other areas identified as necessary

to increase Student's independence in the school setting. These must be in place prior to beginning 7th grade for the 2014-2015 school year. Compensation services shall also address any academic areas Student was unable to benefit from due to District's failure to provide a FAPE during this time. After consultation with parents, the District shall submit a plan for compensatory services to the OPI Dispute Resolution Office (the Office) for approval **by June 13, 2014.**

4. The District's special education director and all District principals are expected to attend the Fall 2014 special education law training scheduled for **October 2, 2014**, in Helena, MT. Any absences must be pre-approved by the OPI Dispute Resolution Officer.

/s/ Ann Gilkey

Ann Gilkey

OPI Compliance Officer

c: Mary Gallagher, Dispute Resolution/EAP Director
Frank Podobnik, State Special Education Director
*** , Board of Trustees, *** Public School, Chair